Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-299

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A CORPORATION,

Petitioner,

vs.

BRANDT ELEVATOR, INC., L. H. GRAIN CO., AND JOHNSON GRAIN & MILLING CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

RICHARD M. FREEMAN,
JAMES P. DALEY,
JOHN S. BISHOF, JR.,
400 West Madison Street,
Chicago, Illinois 60606,
Telephone: (312) 454-6506,

FRANK W. DAVIS, JR.,
2600 Ruan Center,
Des Moines, Iowa 50309,
Telephone: (515) 243-6251,
Attorneys for Petitioner.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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BRANDT ELEVATOR, INC., L. H. GRAIN CO., AND JOHNSON GRAIN & MILLING CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Iowa rendered in these proceedings on May 25, 1977.

OPINIONS BELOW.

The Memorandum Opinion upon Motions for Summary Judgment of the District Court of the State of Iowa in and for Polk County is unreported and appears at Appendix B, *infra*, pp. B1-B5.

The opinion and judgment of the Supreme Court of Iowa is reported at 254 N. W. 2d 6, and appears at Appendix A, *infra*, pp. A1-A23.

JURISDICTION.

The judgment of the Supreme Court of Iowa was rendered on May 25, 1977 and is final. This court has jurisdiction to review the judgment by Writ of Certiorari under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED.

The Carmack Amendment of the Interstate Commerce Act, 49 U. S. C. A. § 20(11) confers liability upon a common carrier for any loss, damage or injury to property it receives for transportation. The Supreme Court of Iowa has construed this statute to allow a consignor, shipping grain by carrier, damages for shortages to include not only the price per bushel set by contract between consignor and consignee, but also a "minimum weight penalty" agreed to and determined by the consignor and consignee which they attribute to freight expenses. The lowest freight charge that is listed in carrier's published tariff for the amount of grain actually delivered (117,360 lbs.) was exactly the same charge that was listed for the amount of grain originally shipped (120,000 lbs.). The question presented is whether the payment by a common carrier of a "minimum weight penalty" constitutes a rebate of freight charges which is prohibited by the Elkins Act, 49 U. S. C. A. § 41, and the Interstate Commerce Act, 49 U. S. C. A. §§ 2 and 3(1).

STATUTES INVOLVED.

The federal statutes involved are the Carmack Amendment of the Interstate Commerce Act, 49 U. S. C. A. § 20(11); Elkins Act, 49 U. S. C. A. § 41; and Interstate Commerce Act, 49 U. S. C. A. §§ 2, 3(1) and 6(7), which are set forth in Appendix D, at pp. D1-D7.

STATEMENT OF THE CASE.

Originally, sixty grain dealers filed an action against Chicago and North Western Transportation Company, a common carrier (hereinafter "petitioner in this case" or "petitioner") to recover a "minimum weight penalty" on each of 733 separate shipments of grain transported in interstate commerce. In their amended three-count complaint, these dealers sought $25,137.75 in damages based on three causes of action consisting of negligence, breach of contract and statutory liability under the Carmack Amendment, 49 U. S. C. A. § 20(11) (R. 1-2).[1] Petitioner filed its answer and *inter alia* affirmatively alleged that the claims for relief were claims for rebates of freight charges on shipments of property transported in interstate commerce and barred by the provisions of 49 U. S. C. A. §§ 2, 3(1) and 41 (R. 3-4).

The grain dealers and petitioner submitted cross motions for summary judgment regarding Count III of the complaint which alleged liability under 49 U. S. C. A. § 20(11) (R. 4-5), with supporting briefs, and presented a stipulation of facts (R. 6-14) and exhibits. Since all 733 claims presented by the sixty dealers are based on almost identical factual situations, the stipulation of facts that has been relied upon by the lower courts refers only to one representative claim. For the sake of simplicity and uniformity, this Statement of the Case will continue to refer to that claim (Appendix C, pp. C1-C7) (R. 6-14).

After hearing oral argument, the District Court in and for Polk County, State of Iowa, filed a memorandum opinion on December 19, 1974, which held the following:

> "If defendant would recognize and pay L. H. Grain Co.'s claims for the so-called 'minimum weight penalty' in the amount of $10.97, defendant would have transported 117,640 pounds of soybeans from Dolliver, Iowa to Beau-

1. Refers to the Amended Stipulated Appendix as certified to this Court by the Supreme Court of Iowa.

mont, Texas, for a freight charge of $560.98, whereas the minimum lawful tariff charge for such transportation was $571.95. The Court is of the opinion that such would constitute a rebate and be unlawful." (R. 18; Appendix B, *infra*, p. B18.

Judgment was entered on behalf of petitioner on January 17, 1975, and all sixty dealers appealed to the Supreme Court of Iowa. That court dismissed the appeals of fifty-seven dealers because each of their claims was under $1,000, the jurisdictional amount which is required under Iowa law (Rule 333, Rules of Civil Procedure). However, it reversed the District Court's judgment as to the three respondents of this cause based upon the following conclusion:

> "We conclude where a shipper, as here, receives only the point of shipment value of the lost commodity rather than its destination value, a measure of damages which permits him to recover freight charges paid on the lost portion of the shipment as compensation for his 'full actual loss' is proper. In our opinion such a measure of damages does not subject the carrier to the payment of a rebate prohibited by 49 U. S. C. A. sections 2, 3(1) and 41(1)." (Appendix A, *infra*, pp. A22-A23.)

The facts of the case are as follows: On March 16, 1972, L. H. Grain Co., one of the respondents in this cause (hereinafter "respondent") shipped by petitioner a carload of soybeans weighing 120,000 lbs. from Dolliver, Iowa to Beaumont, Texas under a Uniform Bill of Lading, freight collect. In a private contract for sale, to which petitioner was not a party, respondent agreed to deliver 120,000 lbs. of soybeans by carrier to Continental Grain Company, consignee. Based on that contract, respondent was to receive $3.285 per bushel "TRACK ORIGIN" (R. 14)[2] from consignee, or $6,562.79, if consignee received the 120,000 lbs. of soybeans less natural shrinkage of 150 lbs.[3]

2. TRACK ORIGIN means the price was the price per bushel at origin.

At Beaumont, Texas, the grain delivered weighed 117,640 lbs., or 1,960.67 bushels, and was unloaded by consignee. The contract between respondent and consignee provided that payment would be made to respondent by the consignee on the basis of "WEIGHT-DEST. OFFICIAL."[4] Therefore, consignee paid respondent $6,440.80 [$3.285 × 1,960.67] (R. 14) for a loss to respondent of $120.99. However, that contract also provided that it would be governed by the rules of the Grain and Feed Dealers National Association. In particular, Rule 23 of the Association states that it is the duty of the consignor (respondent in this case) to load cars in accordance with applicable tariff rules regarding minimum weights and to assume any loss resulting from non-compliance with such tariffs. This loss, called the "minimum weight penalty," was calculated by respondent and consignee to be the difference of the grain shipped and delivered (120,000 lbs. − 117,640 lbs. = 2,360 lbs.) times the freight rate applicable to the minimum weight ((.476625) = $10.97). The freight rates applicable to the grain were .476625/cwt. on a minimum weight of 120,000 lbs. ($571.95) or .82/cwt. on actual destination weight ($964.65). The freight charges of $571.95 would apply whether the destination weight was 120,000 lbs. or 117,640 lbs., since the .476625/cwt. rate was based on a minimum weight of 120,000 lbs. Consignee elected to pay the lower minimum weight freight charge and then paid respondent the contract price for the grain actually delivered less the "minimum weight penalty." Respondent then filed a claim with petitioner for both the value of the grain lost and the minimum weight penalty. Petitioner paid $120.99 for the lost grain, but denied respondent's claim for the penalty, which resulted in this controversy.

3. 1 bushel = 60 lbs.
119,850 lbs. = 1,997.5 bushels.
1,997.5 × $3.285 = $6,562.79.

4. Official Destination Weight.

REASONS FOR GRANTING THE WRIT.

I.

The Question Involved in This Case Is of Far-Reaching Importance to All of the Nation's Shippers and Carriers.

The question presented in this petition is of great and recurring significance in the administration of interstate commerce. At the time of this suit, petitioner alone had over 30,000 similar claims pending, of which 733 were involved in this suit. The opinion of the Supreme Court of Iowa, if left unhampered, will have a disruptive impact on interstate commerce. That court has paved the way for all shippers and purchasers to create "actual losses" through private contracts among themselves to be borne by the carrier without regard to the Elkins Act.

Rates for shipping freight based on a minimum weight are used throughout the transportation industry. The minimum weight rate not only applies to grain shipments but also to shipments of many other fungible goods such as coal. Because of the recent importance our country has placed on coal as an energy source, shipments of this commodity have increased. It is inevitable that during transit many shipments will suffer a minimal loss for various reasons and the conflict that is in issue in this controversy will repeat itself many times in the coming months.

Only this Court by reviewing this cause can give the Carmack Amendment and Elkins Act a uniform construction that would end these recurring problems of application which presently and will continually plague state and federal courts.

II.

The Supreme Court of Iowa Has Decided an Important Question of Federal Law Which Has Not Been Settled by This Court.

The court below relies heavily on *Pennsylvania R. Co.* v. *Olivit Bros.*, 243 U. S. 574 (1917), in its determination that respondents' recovery of freight charges paid is proper and not prohibited by the Interstate Commerce Act, 49 U. S. C. A. §§ 2, 3(1) and 41(1). In *Olivit,* plaintiff shipped to itself a number of carloads of melons valued at $13,500 at time and place of shipment. Carrier delivered the melons in a damaged condition, which was eventually sold for $8,900. One of the issues decided by the court was whether plaintiff could recover the difference between the value of the property at the time and place of shipment and the proceeds of the sale of the damaged shipment, plus the freight paid ($5,500). The court noted that there was an agreement at trial that the damages would be computed upon the basis of the value of the shipment at point of origin. It further observed that the terms of the bills of lading provided that the carrier's liability would be based on the invoice price to the consignee, including paid freight charges, which equaled the value of the property at the time and place of shipment. Under the circumstances, the court held that in order for plaintiff to recover the damages sustained by it *based upon this value,* there was no error to include freight paid as part of plaintiff's recovery, 243 U. S. at 586. Armed with this opinion, the Iowa Supreme Court, in the present case, reasoned that since petitioner paid the value of the soybeans at the point of shipment, recovery by respondents of freight charges paid on the lost portion of the shipment was proper.

That court, however, overlooked the differences that existed between the *Olivit* case and the case at bar. In the present case, as indicated in our Statement, respondents were paid the same price per bushel by the petitioner for the lost shipments

as that which consignee contracted to pay for the delivered grain. This, in itself, made respondents whole.

Secondly, the lawful tariff published regarding freight of this type provided two rates. Consignee elected to pay the lower rate of $571.95, which was the proper freight charge for delivery of 117,360 lbs. of grain under the chosen rate.

Finally, the "minimum weight penalty" was a creation of respondents and consignee. Petitioner was not a party to the contracts for sale of grain which included Rule 23 of the Grain and Feed Dealers National Association.

Moreover, three years after the opinion in *Olivit* was delivered, a similar case was before the court. Mr. Justice Holmes, speaking for the Court in *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97 (1920), found that the provision in the bill of lading, which allowed the same damages as provided for in *Olivit*, prevented recovery of the full actual loss and, therefore, made the stipulation void. The opinion also emphasized the common law rule that:

> "The actual loss caused by breach of contract is the loss of what contractee would have had if the contract had been performed less the proper deductions." 253 U. S. at 100.

The *McCaull-Dinsmore* case appears to lessen the effects of and importance respondents place on *Olivit* in that the inflexible rule of measuring damages based upon the value of the property at the place and time of shipment was short lived.

Because of the use of this type of rate structure, claims against carriers pursuant to the Carmack Amendment, which include losses shippers attribute to freight expenses as an element of their claims, appear to conflict with the broadly applied Elkins Act. The present disparity that exists between construction of these particular sections of the Interstate Commerce Act given by the Supreme Court of Iowa and general precepts regarding these sections, as outlined by this Court and other

federal courts, inevitably leads to the disjointed application of the Interstate Commerce Act by the several state and federal courts.

Review by this Court is crucial in order that a uniform and consistent application of both these sections of the Interstate Commerce Act will be assured.

III.

The Decision of the Supreme Court of Iowa Should Be Reviewed Because It Erroneously Interprets the Carmack Amendment and the Elkins Act of the Interstate Commerce Act.

A. The Opinion of the Supreme Court of Iowa Is So Inconsistent with the Theory of the Elkins Act and Carmack Amendment as to Leave Their Intent and Meaning in a State of Confusion.

The court below stated the following:

> "In determining the 'full actual loss' under section 49 U.S.C. 20(11), it is our opinion the shipper of lost goods is entitled to compensatory damages which will place the shipper in the same position as it would have been if the contract of carriage had been performed without breach." 254 N. W. 2d 6, 17 (Ia., 1977).

Nonetheless, the court failed to recognize the fact that respondents are placed in the same position they would have been if the shipping contract had been performed. Petitioner paid respondents the contract price for the missing grain—the same rate consignee contracted for and actually paid respondents for the grain delivered in good condition.

The court misapprehended the term "full actual loss" when it designated the "minimum weight penalty" as a part of that loss. As stated above, such a penalty was a creation of respondents and consignee. Petitioner was not a party to that agreement which included Rule 23 of the Grain and Feed Dealers National Association. This court and lower federal courts have consistently held that liability under the Carmack Amendment, 49

U. S. C. A. § 20(11) could not be varied by special agreement of the parties or by special circumstances of one of the parties. *United States* v. *New York, N. H. & H. R. Co.*, 211 F. 2d 404 (2d Cir., 1954); *Chicago, M. & St. P. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97 (1920); *Illinois Central R. Co.* v. *Crail*, 281 U. S. 57, 65-66 (1930). Moreover, "only those damages can be recovered as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract [citations omitted]." *F. J. McCarty Co.* v. *Southern Pacific Co.*, 428 F. 2d 690, 693 (9th Cir., 1970).

When petitioner entered into the shipping agreements with respondents, the only damages it had contemplated were actual losses. In this case, the losses comprised the small shortages of grain. Their values were determined by the contract price at destination. The minimum weight penalty provisions in the contract that existed among respondents and consignee, if allowed as a proper element of damages, would give respondents the benefit of a rate lower than that required by the tariff and, therefore, would be unlawful. See *National Beef Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 535 S. W. 2d 521 (Mo. Ct. App., 1976); *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155 (1912); *Davis* v. *Cornwett*, 264 U. S. 560 (1924).

Farley Terminal Co., Inc. v. *Atchison, T. & S. F. Ry. Co.*, 522 F. 2d 1095 (9th Cir., 1975), *cert. denied*, ... U. S. ....., 96 S. Ct. 423 (1975), recently held that where a conflict exists between a published tariff rate and a rate enumerated in a pre-existing agreement, the tariff rate must prevail. The court, in affirming the district court's order for summary judgment in favor of the Santa Fe, was not persuaded by Farley's contention that it was entitled to damages which were based on the variance between the tariff rates it was charged and those rates specified in the pre-existing agreements with the railroad. The court determined that it would upset the uniformity of rates to allow such damages. The facts in the present case lend themselves even more favorably to the rationale of the *Farley*

decision since petitioner was not a party to the pre-existing agreement in this case. This agreement contains the minimum weight penalty provision which specifically earmarks this penalty as a proration of the freight charges and was created for the benefit of shipper and consignee in order to gain a lower shipping rate than the published tariff rate.

In a case closer to the facts in the case at bar, *Illinois Cent. R. Co.* v. *Crail*, 281 U. S. 57 (1930), in that, a carload of coal was not damaged but partially lost, the court acknowledged the following:

> "[T]he test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise not applicable." 281 U. S. at 56-57.

The Court further determined that wholesale market price was a more accurate measure of damages for that shortage since consignee was a coal dealer and would make up the shortage by purchasing coal at that price.

A Texas court of civil appeals applied another method to determine freight damages which was approved by this Court in *Gulf, C. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31 (1917). The damages were computed to be the difference between the invoice price and the value of the freight at the time it was delivered.

In most decisions, the courts have expressed the need to examine the facts of each case before applying a formula to determine "full actual cost" (*Illinois Central R. Co.* v. *Zucchero*, 221 F. 2d 934 (8th Cir., 1955)). Whereas the opinion of the Iowa Supreme Court disregarded that rationale and has literally and conveniently applied the rule from *Olivit* without carefully considering what the actual costs are to compensate respondents for their loss. As a result, it has abruptly departed from the proper enforcement of the Elkins Act, while at the same time it

has broadened the relief under the Carmack Amendment as to redefine the term "full actual loss" to include losses that heretofore have been disallowed. *Missouri P. R. Co.* v. *H. Rouw Co.*, 258 F. 2d 445 (5th Cir., 1958), *cert. denied*, 358 U. S. 929 (1958); *W. A. Stackpole Motor Transp.* v. *Malden Spin. & Dye Co.*, 263 F. 2d 47 (1st Cir. 1958).

B. The Decision Below Should Be Reversed Because It Allowed a Measure of Damages Which Constituted a Rebate Payment That Is Prohibited by 49 U. S. C. A. §§ 2, 3(1) and 41(1).

In the present case, the "minimum weight penalty" had been earmarked by respondents and consignee as a loss of freight expenses due to the shortage of grain at point of destination. This amount could not be attributed to the shortage or considered part of the actual loss to the freight because petitioner had paid the claim submitted by respondents for the value of grain lost during shipment. As stated before, the freight charge for this carload of grain was properly calculated under the applicable tariffs and was owed by the consignee. Under 28 U. S. C. A. § 6(7), petitioner has a duty to collect the published tariff rates and is forbidden to charge any rate different from the tariff rate. *Louisville & N. R. Co.* v. *Maxwell*, 237 U. S. 94 (1915); *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156 (1922); *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478 (1939).

Because of the strict construction given by this Court and the intendment of Congress regarding the Elkins Act, neither shipper nor consignee could recover freight charges directly from carrier when such charges were in accordance with the published tariff for the type and actual amount of property delivered to consignee. However, because respondents and consignee provided for a "minimum weight penalty" clause in their contract, of which petitioner was not a party, the Supreme Court of Iowa has allowed these parties to extend petitioner's liability beyond that of common law. *Illinois Cent. R. Co.* v. *Crail*, 281

U. S. 57 (1930). Therefore, petitioner contends that this overpayment would constitute an unlawful rebate. See *Southern Pacific Co.* v. *Miller Abattoir Co.*, 454 F. 2d 357, 360-361 (3d Cir., 1972).

It was keenly observed by the Court of Civil Appeals of Texas in *Thompson* v. *H. Rouw Co.*, 237 S. W. 2d 662 (Tex. Civ. App., 1951), that the Carmack Amendment does not speak of damages to the parties, but damages to the property. Respondents' and consignee's separate contracts create a penalty which is ultimately to be borne by the carrier. This situation is the very evil that the Elkins Act was to effectively combat. To allow this device to continue unchecked would permit shippers and consignees to enter contracts for sale of property to be transported by a carrier with provisions that could indirectly lower the tariff rates and ultimately circumvent the Elkins Act.

CONCLUSION.

For the reasons set forth above, petitioner respectfully prays that a Writ of Certiorari be granted to review the judgment of the Supreme Court of Iowa.

Respectfully submitted,

RICHARD M. FREEMAN,
JAMES P. DALEY,
JOHN S. BISHOF, JR.,
400 West Madison Street,
Chicago, Illinois 60606,
Telephone: (312) 454-6506,

FRANK W. DAVIS, JR.,
2600 Ruan Center,
Des Moines, Iowa 50309,
Telephone: (515) 243-6251,
Attorneys for Petitioner.

APPENDIX A.

SUPREME COURT OF IOWA.

May 25, 1977.

ALBION ELEVATOR CO. et al.,

Appellants,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

No. 58020.

Thoma, Schoenthal, Davis, Hockenberg & Wine, Des Moines, for appellants.

Gamble, Riepe, Burt, Webster & Fletcher, Des Moines, for appellee.

Heard before MOORE, *C.J.*, and MASON, UHLENHOPP, HARRIS, and MCCORMICK, *JJ.*

MASON, *Justice.*

On July 6, 1972, sixty grain dealers commenced an action in the Polk District Court against Chicago and North Western Transportation Company, a common carrier of grain, seeking to recover damages for grain lost between various points of departure and destination. Plaintiffs and defendant moved for summary judgment on one of the three theories of recovery asserted in the petition and the district court sustained defendant's motion. Plaintiff's appeal from that ruling and the judgment entered pursuant thereto.

In conjunction with their respective motions for summary judgment, the parties entered into a stipulation setting forth the relevant facts surrounding the controversy. It provides in pertinent part the following:

"* * *

"7. At all times material hereto, defendant and its predecessor in interest [Chicago and North Western Railway Company] have had on file with the Interstate Commerce Commission in the District of Columbia the tariffs, rates and classifications required by the provisions of 49 U. S. C. A. § 6.

"* * *

"9. The issues to be decided in the pending action at the present time are governed by the provisions of the Interstate Commerce Act, 49 U. S. C. A. §§ 1, *et seq.*, particularly the provisions of 49 U. S. C. A. § 20(1) and the provisions of 49 U. S. C. A. §§ 2, 3(1) and 41.

"10. For the purpose of resolution of the issues to be decided in the pending action *at the present time*, plaintiffs and defendant stipulate and agree as follows with respect to each shipment at issue herein.

"* * *

"b. Each shipment was tendered by one of plaintiffs to defendant for transportation in interstate commerce with freight charges collect at destination.

"* * *

"g. The destination weight for each shipment was less than the origin weight.

"h. Freight charges for each shipment were paid by the consignee thereof.

"i. Freight charges * * * were paid * * *, at the election of the consignee, on the basis of freight rates applicable to minimum weights rather than freight rates applicable to actual destination weights.

"j. Freight charges * * * are the same for both the minimum weight and all weights below the minimum weight.

"k. The consignee * * * charged the consignor * * * a minimum weight penalty computed by subtracting the gross destination weight from the minimum weight and multiplying the difference by the freight rate applicable to the minimum weight.

"l. Plaintiffs, by their agent, filed a timely claim in writing with defendant for each shipment.

"m. The claim for each shipment contained both a claim for the value of grain allegedly lost and a claim for a minimum weight penalty.

"* * *

"q. The claim for the minimum weight penalty * * * was computed by subtracting the gross destination weight from either the origin weight or the minimum weight, whichever was less, and multiplying the difference by the freight rate applicable to the minimum weight .

"r. Defendant has paid, in whole or in part, the claim for the value of grain allegedly lost for each shipment.

"s. Defendant has timely declined in writing the claim for a minimum weight penalty for each shipment." (Emphasis in original).

The stipulation went on to set forth the factual situation surrounding one of plaintiffs' claims as representative of the group's claims. That example provided in part as follows:

"a. On March 16, 1972, plaintiff, L. H. Grain Company, as consignor, tendered to defendant's predecessor in interest * * *, a carload of soybeans * * *.

"b. The contract for sale of the soybeans between L. H. Grain Company, as consignor, and Continental Grain Company, as consignee, provided that it was the duty of L. H. Grain Company, * * *, to deliver 120,000 pounds of soybeans to Continental * * *, and to assume any loss resulting noncompliance.

"c. The origin weight * * * was 120,000 pounds.

"* * *

"e. The destination weight * * * was 117,640 pounds.

"f. The minimum weight applicable to the shipment was 120,000 pounds. * * *

"g. The freight rate applicable to the minimum weight was $0.476625 per one hundred pounds. * * *

"h. The freight charges applicable under the minimum weight tariff were $571.95 (120,000 × $0.476625).

"i. The freight charges applicable under the minimum weight tariff were the same based on either a destination weight of 120,000 pounds or a destination weight of 117,640 pounds.

"* * *

"k. The freight charges applicable under the actual destination weight tariff would have been $964.65. (117,640 × $0.82).

"1. Continental Grain Company, * * *, elected to pay freight charges based on the minimum weight tariff applicable to 120,000 pounds.

"m. Continental Grain Company, * * *, charged and collected from L. H. Grain Company, * * *, a minimum weight penalty of $10.97 computed by deducting the gross destination weight of 117,640 pounds from the minimum weight of 120,000 pounds and multiplying the difference (2,360 pounds) by the freight rate applicable to the minimum weight ($0.4650). (The consignee did not add the 2.5% surcharge * * *).

"n. On May 11, 1972, L. H. Grain Company, * * *, by its agent, * * *, filed a timely claim in writing with defendant.

"o. The claim contained a claim for $120.99 for the value of the soybeans allegedly lost and a claim for $10.97 for a minimum weight penalty.

"* * *

"r. On May 26, 1972, defendant timely declined in writing the claim for a minimum weight penalty.

"s. On June 9, 1972, defendant paid * * * [L. H. Grain's agent] $120.99."

The basic contentions of the parties were set forth in the stipulation as follows:

"12. For the purpose of resolution of the issues to be decided in the pending action at the present time, plaintiffs contend that the minimum weight penalty is a proper

element of damages permitted under the provisions of 49 U. S. C. A. § 20(11). Defendant denies such contention.

"13. For the purpose of resolution of the issues * * *, defendant contends that the minimum weight penalty is a rebate of freight charges prohibited under the provisions of 49 U. S. C. A. §§ 2, 3(1) and 41. Plaintiffs deny such contention."

December 19, 1974, the district court granted defendant's motion for summary judgment and in so ruling concluded as follows:

"It is unlawful for a common carrier in interstate commerce to, directly or indirectly, by rebate or other device, collect or receive a less compensation for service rendered in transportation than it charges other persons for like service (49 U. S. C. A. sec. 2). In addition, the Elkins Act enjoins that a carrier strictly observe its tariffs, and makes it unlawful for any shipper or consignee to solicit or receive any rebate or other concession whereby property is transported at a less rate than that published in the carrier's tariffs (49 U. S. C. A. sec. 41).

"It will be seen from the foregoing that L. H. Grain Co. has been 'made whole' by defendant insofar as the actual disappearance of 2,360 pounds of soybeans is concerned. L. H. Grain Co.'s being charged a so-called 'minimum weight penalty' of $10.97 by Continental Grain Company is the result of a contractual arrangement whereby L. H. Grain Co. assumes a theoretical charge if Continental is not able to receive the maximum possible benefit, i.e., transportation of the maximum weight possible, from the minimum weight rate tariff provisions.

"If defendant would recognize and pay L. H. Grain Co.'s claims for the so-called 'minimum weight penalty' in the amount of $10.97, defendant would have transported 117,640 pounds of soybeans * * *, for a freight charge of $560.98, whereas the minimum lawful tariff charge for such transportation was $571.95. The Court is of the opinion that such would constitute a rebate and be unlawful."

January 17, 1975, the district court entered judgment for defendant, overruled plaintiffs' motion for summary judgment and dismissed the petition.

A summary of the pertinent stipulated facts gleaned from the statement of the case set forth in plaintiffs' brief may be helpful, particularly in view of the fact defendant makes no complaint of the statement.

The published tariff with respect to grain shipments which defendant must follow by law establishes certain freight rates applicable to minimum weights for the carriage of grain between two specific points. The minimum weight for soybeans as established by tariff is 120,000 pounds. The freight rate applicable to this minimum weight is .476625 per one hundred pounds and since the freight rate is based on the minimum weight rather than the actual destination weight, the railroad consistently collects a full charge of $571.95 (120,000 pounds × .476625 per one hundred pounds) regardless of the actual destination weight.

In the particular claim presented for illustration in the stipulated facts the consignor loaded 120,000 pounds but only 117,640 pounds were delivered by the carrier. Irrespective of this shortage the railroad collected the same freight charge ($571.95) on 117,640 pounds of soybeans as it would have received on 120,000 pounds of soybeans if that amount had been delivered.

The contractual relationship between the grain elevators (consignors) and the grain buyers (consignees) provides the contract purchase price of the grain is determined on the price or value of the grain at the shipping point and not at the destination point. Freight charges are to be paid by the consignee, collected at destination. The contract also requires the consignors to load and deliver minimum weights. The consignors agreed to assume any loss resulting from failure to deliver minimum weights of grain.

The example set forth in the stipulated facts is used by plaintiffs to explain the term "minimum weight penalty." As stated, the consignor and consignee had entered into a contract for the sale and delivery of 120,000 pounds of soybeans which is the minimum weight prescribed by tariff and as such produces the

lowest freight cost per pound to the consignee who is obligated to pay the freight charges. Since the freight charge is the same on 120,000 pounds as on 117,640 pounds or any weight below 120,000 pounds, the consignee minimizes its transportation costs by receiving shipments at or above minimum weights. In the example used the consignee paid $571.95 in freight charges to the railroad for 117,640 pounds of soybeans which is a transportation expense of .48618 per one hundred pounds. If the railroad had delivered the amount of grain called for in the contract and actually loaded by the consignor into the railroad car, that is, 120,000 pounds, then the transportation costs per one hundred pounds of delivered product would only be .476625. Thus, failure of the railroad to deliver the full 120,000 pounds results in the consignee having to bear a higher freight rate (approximately $.01 per one hundred pounds) than anticipated and desired.

The consignee in such a situation would normally have various options available to it in seeking to recoup this loss caused by the railroad's failure to deliver all the grain loaded. The consignee could refuse to pay a proportionate part of the freight charges, i.e., the minimum weight rate per hundred pounds (.476625) times the shortage (2,360 pounds). Otherwise, the consignee could elect to pay the full freight charge and then file a claim for reimbursement based on the same proportionate calculations. In either case, the amount of the claim would be the same. Finally, the consignee could pursue the method utilized in the instant case which is to enter into agreements with the consignors that the consignors will assume any loss suffered by the consignee where shipments at less than the full minimum weight are delivered by the railroad. The consignees thus pay the full freight charge and then simply deduct from the purchase price due the consignor of the delivered grain the proportionate "excess" freight charge per one hundred pounds incurred. The consignors thereby become assignees of whatever claim the consignee had against the railroad for freight charges. The consignor then pre-

sents claims to the railroad for both the contract price of the lost grain and the proportionate share of the freight charge paid on grain that was never delivered. This proportionate share of the freight charge claim is referred to as a "minimum weight penalty."

The tariff provides an alternative for payment of freight charges based on actual destination weight rather than minimum weight, but the freight rate applicable under this alternative is $0.82 per one hundred pounds.

The contract price of soybeans in the illustrated case was $3.285 per bushel, the price at the Iowa elevator. When the grain arrived at Beaumont, Texas, the consignee paid the consignor the contract price of grain actually delivered (1960.67 bushels × $3.285) less $10.97 as the minimum weight penalty.

The consignor filed a claim with defendant for both the loss of grain and the minimum weight penalty.

The railroad contends payment of the minimum weight penalty would constitute a rebate which the law prohibits. Plaintiffs contend otherwise.

Plaintiffs' contentions herein present the following question for this court's consideration: Would defendant's payment of plaintiffs' minimum weight penalty claims constitute a prohibited rebate of freight charges or would it simply be the payment of an appropriate element of recoverable damages?

I. The challenged ruling of the trial court was based upon the facts established by the previously mentioned stipulation filed herein. Accordingly, this court's scope of review is as follows:

> "Where the facts are not in material dispute, interpretation placed thereon by trial court becomes a question of law which is not conclusive on appeal. * * * [citing authority]." *City of Spencer* v. *Hawkeye Security Insurance Co.*, 216 N. W. 2d 406, 408 (Iowa 1974).

II. The petition in this law action comprises 60 separate divisions of three counts each, all similar in nature. In the aggregate, plaintiffs seek recovery of $25,000.00 as damages. Only three of the plaintiffs seek recovery of $1,000 or more.

Rule 333, Rules of Civil Procedure, provides:

> "Except where the action involves an interest in real estate, no appeal shall be taken in any case where the amount in controversy, as shown by the pleadings, is less than one thousand dollars, unless the trial judge, within thirty days after the judgment or order is entered, certifies that the cause is one in which appeal should be allowed. The right of appeal is not affected by any remission of any part of the verdict or judgment."

No certification contemplated by rule 333 was filed herein.

In the absence of the requisite amount in controversy established by rule 333 this court is without jurisdiction to hear the appeal and it must consequently be dismissed. *Bridal Publications, Inc.* v. *Richardson*, 229 N. W. 2d 771, 773-774 (Iowa 1975); *Benttine* v. *Jenkins Truck Lines, Inc.*, 182 N. W. 2d 374, 376 (Iowa 1970).

In light of rule 333 a question arises as to the right of 57 of these plaintiffs to prosecute this appeal since no one of them can alone supply the requisite jurisdictional amount in controversy for an appeal under this rule.

No motion was made to dismiss any of these appeals. Nevertheless, this court can and should dismiss an appeal on its own motion when the lack of jurisdiction is apparent.

We must therefore decide if the amount in controversy exceeds the minimum required by the rule.

Resolution of that question involves consideration of two judicially evolved theories pertaining to amount in controversy requirements.

One tactic which would enable the 57 plaintiffs to maintain their appeals is founded upon the aggregation of the individual claims asserted. In the federal arena, the following statement from *Zahn* v. *International Paper Company*, 414 U. S. 291,

292-295, 94 S. Ct. 505, 507-509, 38 L. Ed. 2d 511, conclusively disposes of an argument based upon the alleged validity of the aggregation of claims to satisfy an amount in controversy requirement.

> "From the outset, Congress has provided that suits between citizens of different States are maintainable in the district courts only if the 'matter in controversy' exceeds the statutory minimum * * *. 28 U.S.C. § 1332(a). The same jurisdictional-amount requirement has applied when the general federal-question jurisdiction of the district courts, 28 U.S.C. § 1331(a), is sought to be invoked. A classic statement of the dichotomy that developed in construing and applying these sections is found in *Troy Bank of Troy, Indiana* v. *G. A. Whitehead & Co.*, 222 U.S. 39, 40-41, 32 S.Ct. 9, 56 L.Ed. 81 (1911):
>
> " 'When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.'
>
> "This distinction and rule that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement * * * were firmly rooted in prior cases dating from 1832, and have continued to be accepted construction of the controlling statutes, now §§ 1331 and 1332. The rule has been applied to forbid aggregation of claims where none of the claimants satisfies the jurisdictional amount, as was the case in *Scott* v. *Frazier*, 253 U.S. 243, 244, 40 S.Ct. 503, 64 L.Ed. 883 (1920), for example, where the Court stated the rule to be that 'the amount in controversy must equal the jurisdictional sum as to each complainant.' * * *"

In *Snyder* v. *Harris*, 394 U. S. 332, 335, 89 S. Ct. 1053, 1056, 22 L. Ed. 2d 319, reh. den., 394 U. S. 1025, 89 S. Ct. 1622, 23 L. Ed. 2d 50, is the following language:

> "The traditional judicial interpretation under all of these statutes has been from the beginning that the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement. Aggregation has been permitted only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. * * *."

The following are a few of the many cases which have applied the principles set out above: *National Treasury Employees Union* v. *Nixon*, 160 U. S. App. D. C. 321, 492 F. 2d 587, 592; *Deutsch* v. *Hewes Street Realty Corporation*, 359 F. 2d 96, 98, n. 1 (2 Cir. 1966); *Alvarez* v. *Pan American Life Insurance Company*, 375 F. 2d 992, 994 (5 Cir. 1967), 3 A. L. R. Fed. 363, cert. den., 389 U. S. 827, 88 S. Ct. 74, 19 L. Ed. 2d 82; *Crenshaw* v. *Great Central Insurance Co.*, 482 F. 2d 1255, 1259-1260 (8 Cir. 1973); *Handy* v. *General Motors Corporation*, 518 F. 2d 786, 787 (9 Cir. 1975); *Hylte Bruks Aktiebolag* v. *Babcock & Wilcox Company*, 305 F. Supp. 803, 807 (S. D. N. Y. 1969); *Georgia Ass'n of Ind. Ins. Ag., Inc.* v. *Travelers Indem. Co.*, 313 F. Supp. 841, 843 (N. D. Ga. 1970); *United Pacific/Reliance Ins. Cos.* v. *City of Lewiston*, 372 F. Supp. 700, 701-702 (D. Idaho 1974).

In *Bridal Publications, Inc.* v. *Richardson*, 229 N. W. 2d at 775-776, this court in dealing with the aggregation theory employed the following analysis:

> "* * * [T]here are many federal cases holding the jurisdictional amount may not be achieved by such aggregation.
>
> "The principle of those federal cases is stated in this fashion in *Georgia Ass'n of Ind. Ins. Ag., Inc.* v. *Travelers Indem. Co.*, 313 F. Supp. 841, 843:
>
> " 'It is well settled, of course, that "when two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount." * * * [citing authorities].'

"*Crenshaw* v. *Great Central Insurance Co.*, 482 F. 2d 1255, 1259-1260 (8 Cir. 1973), has this statement:

" ' "It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements." '

" 'The rule just stated forecloses the aggregation of the claims of the separate and distinct plaintiffs for the purpose of determining subject matter jurisdiction.'

"We recognize that the foregoing cases concern 'the amount in controversy' necessary for jurisdiction in federal courts. However, we see no basis why the reasoning in those opinions should not be relied on in reaching a determination in this case.

"We therefore conclude the correct rule should be that the *appellate jurisdiction of this court cannot be rested upon the aggregate of several totally separate and distinct claims no one of which is itself alone of sufficient size to confer such jurisdiction.* * * *."(Emphasis supplied). See also *Kentucky Dept. Store* v. *Fidelity-Phenix Fire Ins. Co.*, 351 S. W. 2d 508, 509 (Ky. 1961); *Bolling* v. *Old Dominion Power Co.*, 181 Va. 368, 25 S. E. 2d 266, 268.

A second arguably available basis for maintenance of the appeals herein is the concept of pendent jurisdiction. Utilizing said concept courts have exercised jurisdiction over claims of individuals who could not alone satisfy jurisdictional amount requirements. This expansion of jurisdiction is justified by the fact that the claim over which the court has no jurisdiction is closely related to a claim within the scope of the court's jurisdiction.

A number of federal courts, relying upon pendent jurisdiction have exercised jurisdiction over claims of less than $10,000 where those claims were joined with, closely related to and involved the same operative facts as claims for more than $10,000. See e.g., *Jacobson* v. *Atlantic City Hospital,*

392 F. 2d 149, 153-155 (3 Cir. 1968); *Stone* v. *Stone*, 405 F. 2d 94, 96-99 (4 Cir. 1968), cert. den., 409 U. S. 1000, 93 S. Ct. 315, 34 L. Ed. 2d 261, reh. den., 409 U. S. 1118, 93 S. Ct. 896, 34 L. Ed. 2d 703; *F. C. Stiles Contracting Co.* v. *Home Insurance Co.*, 431 F. 2d 917, 919-920 (6 Cir. 1970); *Beautytuft, Inc.* v. *Factory Insurance Association*, 431 F. 2d 1122, 1128 (6 Cir. 1970); *Hatridge* v. *Aetna Casualty & Surety Company*, 415 F. 2d 809, 816-817 (8 Cir. 1969). However, at least one circuit has rejected the application of pendent jurisdiction in such circumstances as an impermissible expansion of federal jurisdiction. In *Hymer* v. *Chai*, 407 F. 2d 136, 137 (9 Cir. 1969), the court makes the following comments:

> "Mrs. Chai's claim of $7500 damages for loss of consortium fell below the monetary minimum necessary to sustain federal diversity jurisdiction * * *, and no independent basis for federal jurisdiction existed. The District Court had no jurisdiction * * * unless her claim can be tacked to her husband's action by the doctrinal thread known as 'pendent jurisdiction.'
>
> "The doctrine of pendent jurisdiction permits a federal court to accept jurisdiction of a party's nonfederal claims which are intertwined with his federal claims in a case in which all of the claims emerge from 'a common nucleus of operative fact.' (*United Mine Workers* v. *Gibbs* (1966), 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218.) Pendent jurisdiction was devised to avoid the waste and inefficiency resulting from fragmenting a single action and dividing the pieces into separate proceedings before the state and federal courts and to encourage a party who had a claim presenting a substantial federal question, mixed with a nonfederal claim, to take his bundle of claims to the federal court.
>
> "Joinder of claims, not joinder of parties, is the object of the doctrine. It was not designed to permit a party without a federally cognizable claim to invoke federal jurisdiction by joining a different party plaintiff asserting an independent federal claim growing out of the same operative facts. * * *."

The Supreme Court's opinion in *Zahn, supra,* seriously undermines the foundation upon which are based those opinions cited above which approve of the pendent party jurisdictional theory. In *Zahn,* following the previously quoted statement of the general rule, the Court said:

> "* * * It also requires dismissal of those litigants whose claims do not satisfy the jurisdictional amount, even though other litigants assert claims sufficient to invoke the jurisdiction of the federal court. * * * [citing authorities].
>
> "In *Clark* v. *Paul Gray, Inc.*, [306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001] decided after the effective date of the Federal Rules of Civil Procedure in 1938, the Court applied the familiar rule that 'when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount * * *.' 306 U.S., at 589, 59 S.Ct., at 748. Upon ascertaining on its own motion that only one of the plaintiffs in the District Court had presented a claim satisfying the jurisdictional amount, the court reached the merits of that claim but directed the District Court to dismiss the claims of all other plaintiffs for want of jurisdiction." 414 U.S. at 295-296, 94 S.Ct. at 509, 38 L.Ed. 2d at 511.

A number of courts have read *Zahn* as extinguishing the concept of pendent party jurisdiction. In *Osbahr* v. *H & M Const., Inc.*, 407 F. Supp. 621, 622-623 (N. D. Iowa, W. D. 1975), is the following:

> "* * * [A] number and perhaps a majority of the federal circuits have extended the doctrine of pendent jurisdiction to encompass the joinder not only of claims but of additional parties, thus creating the category of 'pendent parties.' * * * [citing authorities]. With specific relevance to this case, pendent jurisdiction has been exerted over a claim against a party for less than $10,000 if diversity exists and a claim against another diverse party exceeds $10,000. * * * [citing authorities].
>
> "The continuing validity of the reasoning in these latter cases has been undermined by the Supreme Court's decision in Zahn * * *, which held that multiple plaintiffs in a class action must each satisfy the jurisdictional amount requirement. * * * As the dissent in that case indicates, ancillary or pendent jurisdiction over the claims for less than $10,000 was argued to but not accepted by the majority. * * * This court is inclined to agree with the view that pendent jurisdiction may no longer be extended over additional parties against whom a separate claim falls short of the requisite jurisdictional amount. * * * [citing authorities]." See also *Freeman* v. *Gordon & Breach, Science Publishers, Inc.*, 398 F. Supp. 519, 524-526 (S. D. N. Y. 1975); *United Pacific/Reliance Ins. Cos.* v. *City of Lewiston, supra,* 372 F. Supp. at 702-705. But see *Afton Alps, Inc.* v. *United States,* 392 F. Supp. 543, 546, n. 2 (D. Minn. 1974).

1. Moore's Federal Practice, section 0.97[3], expresses the following view of the problem:

> "Where two or more plaintiffs join in the same action to prosecute their individual claims against a single defendant, and the claims are separate and distinct, each claim must rest on an independent jurisdictional basis and the values of these several rights may not be aggregated in determining the amount in controversy. Plaintiff's claims may not be aggregated merely because the plaintiffs have a community of interest or because their claims are derived from a single instrument.
>
> "Nor does the fact that their claims arise from the same occurrence or set of operative facts permit aggregation. Some courts have circumvented this rule of aggregation by extending the principle of pendent jurisdiction, traditionally applied only in federal question cases, to diversity cases thereby allowing a claim for less than the jurisdictional amount arising out of the same operative facts to 'ride on the coattails' of a claim meeting the jurisdictional requisite. In light of the Supreme Court's reaffirmation in *Snyder* v. *Harris* of the traditional rule that separate and distinct claims must individually meet the amount requirement, this application of pendent jurisdiction seems unacceptable, and some cases have so held.

"Where, however, the several plaintiffs unite to enforce an 'integrated' or 'undivided' right, it is the value of the entire right which is in controversy and this total value is used, when pertinent, in determining whether or not federal jurisdiction exists.

"The classic statement of the rule is contained in *Pinel* v. *Pinel* [240 U. S. 594, 596, 36 S. Ct. 416, 60 L. Ed. 817, 818] where the Court, speaking through Justice Pitney, said:

" 'The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount, but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.' " See also 1 Cyc. of Fed. Proc., (Third Ed.), section 2.220.

The authors of 14 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction section 3704, analyze the problem and criticize the solution of it suggested by some federal courts.

It is clear under rule 333, R. C. P., the claims of 57 of these plaintiffs standing alone cannot be maintained on appeal because of the lack of the requisite jurisdictional amount in controversy. The question here is whether the appellate jurisdiction of this court may be exercised over those claims when joined with a claim being prosecuted on appeal where the requisite amount in controversy exists.

This question is not precisely the same as the question raised in *Bridal Publications, Inc.* v. *Richardson,* Iowa, 229 N. W. 2d 771.

We again recognize, as we did in *Bridal Publications,* that the cases which we rely on in reaching our determination of this question concern "the amount in controversy" necessary for jurisdiction in federal courts. 229 N. W. 2d at 776.

In our opinion the reasons relied on for recognition of the doctrine of pendent jurisdiction in the federal courts, *Hymer* v.

Chai, 407 F. 2d at 137, do not exist here where only appellate jurisdiction is involved. In addition, it is at least seriously doubtful whether the pendent party jurisdictional doctrine remains a viable theory following the Court's pronouncements in *Zahn.*

Plaintiffs here assert claims arising from identical factual circumstances, but the claim of each plaintiff clearly arose from separate and distinct occurrences. Where, as here, the claims of the respective plaintiffs are several and distinct, we conclude each must establish the requisite amount for his appeal to be within the appellate jurisdiction of this court.

The foregoing conclusion requires the appeals of those plaintiffs who did not seek damages of $1,000 or more be dismissed. Consequently, only the claims of Brandt Elevator, Inc., L. H. Grain Co., and Johnson Grain & Milling Co. will be dealt with herein.

It should be noted that although the summary judgment motion granted herein only pertained to one of the three theories of recovery asserted in the petition, the ruling thereon resulted in a judgment for defendant on all counts. The trial court evidently concluded that its ruling on the motion precluded relief under any theory of recovery. Therefore, this appeal is not subject to dismissal on the ground the adjudication below did not dispose of the entire matter. See *Swets Motor Sales, Inc.* v. *Pruisner,* 236 N. W. 2d 299, 302 (Iowa 1975); *Flynn* v. *Lucas County Memorial Hospital,* 203 N. W. 2d 613, 614-615 (Iowa 1973).

III. As noted, plaintiffs maintain the minimum weight penalty is an appropriate element to be considered in fixing damages sustained by reason of the loss of a portion of the soybeans shipped. Plaintiffs rely upon 49 U. S. C. A. section 20(11), which provides in part as follows:

> "Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation * * * shall be liable * * * for any loss, damage, or injury to such property caused by it * * *."

Defendant, on the other hand, maintains payment of the minimum weight penalty would constitute a rebate prohibited by 49 U. S. C. A. sections 2, 3(1) and 41(1), which provide in part as follows:

> "If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service * * *, than it charges, demands, collects, or receives from any other person or persons for doing * * * a like and contemporaneous service * * * under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." 49 U. S. C. A. section 2.
>
> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, * * *, in any respect whatsoever; or to subject any particular person, company, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; * * *." 49 U. S. C. A. section 3(1).
>
> "* * * The willful failure upon the part of any carrier subject to [said Acts] to file and publish the tariffs or rates and charges as required by said [Acts], or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, * * *; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said [Act] * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, * *, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give or solicit, accept, or receive any such rebates, concessions, or discrimination shall be deemed guilty of a misdemeanor, * *." 49 U. S. C. A. section 41(1).

In view of the provisions of 49 U. S. C. A. section 20(11) the question is whether the freight charges attributable to the lost soybeans are submissible items of damages under the circumstances shown by the record.

If the minimum weight penalty is a proper item of common law damages as maintained by plaintiffs, it is their contention payment of such item by the carrier would not constitute a rebate which is prohibited by 49 U. S. C. A. sections 2, 3(1) and 41(1), set out earlier.

At this point, this court must decide whether 49 U. S. C. A., section 20(11) changes the common law measure of damages.

In *Chicago, M. & St. P. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 40 S. Ct. 504, 64 L. Ed. 801, the Court was faced with a situation where the carrier, relying upon the terms of the bill of lading, was seeking to limit its liability to an amount less than that prescribed by the common law measure of damages. The following language from that opinion demonstrates the Court's belief the common law measure of damages was incorporated by the provisions of the Interstate Commerce Act:

> "* * * The rule of the common law is not an arbitrary fiat, but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, *less the proper deductions* [freight charges], which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later Act * * *, can prevail against what we understand to be the meaning of the words. * * *." 253 U. S. at 100, 40 S. Ct. at 504, 64 L. Ed. at 803. (Emphasis supplied).

In *Thompson* v. *H. Rouw Co.*, 237 S. W. 2d 662, 665 (Tex. Civ. App. 1951), the court surveyed the legislative and judicial history of 49 U. S. C. A. section 20(11) and concluded as follows:

"* * * The history of these enactments, decisions, and promulgations demonstrates that it is now settled that *nothing more nor less may be recovered than allowed under the common law.* * * *." (Emphasis supplied).

The following authorities lend support to the proposition that the common law measure of damages was codified by 49 U. S. C. A. section 20(11): *Missouri Pacific R. Co.* v. *Elmore & Stahl,* 377 U. S. 134, 137, 84 S. Ct. 1142, 1144, 12 L. Ed. 2d 194; *W. A. Stackpole Motor Transp.* v. *Malden Spin. & Dye. Co.,* 263 F. 2d 47, 51 (1 Cir. 1958); *Aaacon Auto Transport* v. *State Farm Mut. Auto. Ins.,* 537 F. 2d 648, 654-655 (2 Cir. 1976); *Chandler* v. *Aero Mayflower Transit Company,* 374 F. 2d 129, 132, n. 2 (4 Cir. 1967); *Great Atlantic & Pacific Tea Co.* v. *Atchison, T. & S. F. Ry. Co.,* 333 F. 2d 705, 707-708 (7 Cir. 1964), cert. den., 379 U. S. 967, 85 S. Ct. 661, 13 L. Ed. 2d 560; *Yellow Freight System, Inc.* v. *United States,* 413 F. Supp. 357, 371 (W. D. Mo., W. D., 1975); *Sutherland* v. *Ringsby Truck Lines, Inc.,* 549 P. 2d 784, 785 (Colo. App. 1976); *Mont. Ward & Co.* v. *Peter J. McBreen & Assoc.,* 40 Ill. App. 3d 69, 351 N. E. 2d 324, 326; *Forest Green Farmers' Elevator Co.* v. *Davis,* 216 Mo. App. 545, 270 S. W. 394, 397-398.

In the present case the carrier paid plaintiffs the value of the lost soybeans at the time and place of shipment—$3.285 per bushel. This was the contract price fixed by plaintiffs and the consignees. There is no controversy as to this amount or as to the payment thereof by the carrier. The fight is over plaintiffs' claim for a proportionate share of the paid freight charges.

In determining the "full actual loss" under section 49 U. S. C. A. 20(11) it is our opinion the shipper of lost goods is entitled to compensatory damages which will place the shipper in the same position as it would have been if the contract of carriage had been performed without breach.

In certain circumstances, the party shipping goods may recover freight charges as an element of damages arising from transportational loss. In *Pennsylvania R. Co.* v. *Olivit Bros.,* 243 U. S.

574, 585-586, 37 S. Ct. 468, 472, 61 L. Ed. 908, 913-914, are the following comments:

"The fourth contention is that plaintiff should not recover as part of its damages the freight paid upon delivery at destination.

"The contention is rested upon the prohibition of the Interstate Commerce Act against deviation from the filed tariffs and schedules and against rebates and undue preferences and discriminations. It is not asserted in the present case that there was an evasion of the statute or an attempt to evade, but that the possibility of such result makes the recovery of freight illegal. * * * [T]o the contentions the plaintiff opposes the terms of the bills of lading, they providing that the amount of loss or damage for which a carrier is liable 'shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment. . . .'

"Some of the bills of lading do not contain this provision, but it was agreed at the trial that the proper measure of damages was to be computed upon the basis of the value of the property at the place and time of shipment and that such measure should be read into all of the bills of lading. As plaintiff further says, to recover the damages sustained by it, based upon this value, plaintiff must receive from defendant the difference between this value and the proceeds of the sale, and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight. * * * [citing authorities]. The plaintiff was no more than made whole."

In the annotation at 83 L. Ed. 867, 877-879, it is said:

"As to whether the carrier or the consignor must stand the freight charges in case of a loss of or damage to the goods, the rule apparently is that, under bills of lading providing that loss or damage shall be computed at the value or cost of the goods or property at the time and place of shipment, the carrier is not entitled to have the amount of the freight deducted from the value as ascertained under the contract, or, in other words, that the

freight, if paid, should be added to the value at the time and place of shipment.

"* * * [citing authorities].

"* * *

"In the ordinary damage rule, which measures the recovery by the difference between the market value for sound goods at destination on the date when the goods should have arrived and the actual amount received on sale of the damaged goods, no allowance is made whereby the shipper can recover his freight expense. * * *."

The statements quoted from *Olivit Bros.* and the annotation in 83 L. Ed. refer to provisions of the bill of lading as designating the place of computing damages. Attached to the stipulation of facts in this matter and incorporated by reference were exhibits 1 through 7. Exhibit 1 is described as "bill of lading." This exhibit is a photostat of the face of the memorandum copy of the bill of lading and does not have any conditions or provisions printed on the reverse side thereof. We are not made aware of the provisions of the bill of lading at any other point in the record. Nevertheless, the carrier paid the value of the soybeans at the point of shipment.

Plaintiffs concede rebates are prohibited by law but insist a shipper receives no rebate when a measure of damages which does no more than place the shipper in the same position as it would have been if the contract of carriage had been performed without breach is employed.

In our opinion the purpose and intent of 49 U. S. C. A. section 20(11) is to provide full compensation to those who have been damaged by the railroad's failure to complete successfully the carriage of goods. It does not change the common law measure of damages.

We conclude where a shipper, as here, receives only the point of shipment value of the lost commodity rather than its destination value, a measure of damages which permits him to recover freight charges paid on the lost portion of the shipment as

compensation for his "full actual loss" is proper. In our opinion such a measure of damages does not subject the carrier to the payment of a rebate prohibited by 49 U. S. C. A. sections 2, 3(1) and 41(1).

The trial court erred in holding otherwise.

The appeals of 57 of the plaintiffs who did not seek damages of $1,000 or more are dismissed.

The costs in this court shall be taxed 50 percent to the appellee and 50 percent to the 57 appellants whose appeals have been dismissed.

The case is—

Reversed and remanded as to plaintiffs Brandt Elevator, Inc., L. H. Grain Co., and Johnson Grain & Milling Co.

APPENDIX B.

IN THE DISTRICT COURT OF THE STATE OF IOWA
in and for Polk County.

ALBION ELEVATOR CO., ET AL.,
Plaintiffs,
vs.
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Defendant.

Law No. 2233.

MEMORANDUM OPINION UPON MOTIONS FOR SUMMARY JUDGMENT.

The above action was brought by some fifty shippers against the defendant railroad for damages arising from losses of grain in connection with shipments made in interstate commerce. The claims of each shipper are contained within a separate division of the petition. Each such division is divided into three counts, purporting to plead the respective claims upon three theories.

The Court here is concerned with motions for summary judgment made by the parties. Said motions were submitted upon a stipulation of facts and upon written briefs and arguments. Plaintiffs' brief was submitted by William R. King, Richard G. Santi, and William F. Conlon. Defendant's brief was submitted by Frank W. Davis, Jr.

Defendant's Motion for Summary Judgment states that it is limited to "the issues raised by Count III of Division I-LX, inclusive, of the Petition at Law, as amended, by Count III of Division I-LX, inclusive, of the Answer and by Division LXV of the Answer."

Plaintiffs' Motion for Summary Judgment states that it is limited to "the sole issue of whether or not plaintiffs' claims against defendant railroad for minimum weight penalties are permissible as a damage element or prohibited as constituting a rebate prohibited by law."

The facts involved can be understood best by reference to the factual situation set out in the stipulation of facts. Said stipulation discloses that plaintiff L. H. Grain Co. entered into a contract with Continental Grain Company to sell and deliver 120,000 pounds of soybeans to Continental Grain Company at Beaumont, Texas. The contract provided that L. H. Grain Co. would assume any loss resulting from noncompliance with said contract. The contract also provided that, with certain exceptions, it was governed by the rules of the Grain And Feed Dealers National Association. Rule 23 thereof provides that it is the duty of the consignor to "load cars in accordance with applicable tariff rules (with respect to minimum weights) and to assume any loss resulting from noncompliance with such (tariffs)."

The contract purchase price of the soybeans was based upon "track origin," i.e., the price of the soybeans at the shipping point, not at the destination point. The soybeans were to be shipped with freight charges collect, to be paid at destination point by the consignee-purchaser, Continental Grain Company.

At times material to the transaction involved there were in effect two tariff rates applicable to the transportation of soybeans from Dolliver, Iowa, to Beaumont, Texas. One rate was $0.476625 per one hundred pounds, providing that the rate had to be figured upon a minimum weight of 120,000 pounds. The other rate was $0.82 per one hundred pounds, applied to the actual destination weight.

On March 16, 1972, L. H. Grain Co., as consignor, tendered to defendant's predecessor railroad at Dolliver, Iowa a carload of soybeans in car CNW 31426 under a uniform straight bill of lading. The soybeans weighed 120,000 pounds at Dolliver. The

car was transported by Chicago and North Western and connecting lines to Beaumont, Texas, where the car was unloaded by Continental Grain Company. The weight of the soybeans unloaded at Beaumont was 117,640 pounds.

The freight charges applicable under the minimum weight tariff were $571.95 (120,000 × $0.476625). This was the minimum charge even though the actual destination weight of the soybeans was 117,640 pounds instead of 120,000 pounds.

The freight charges applicable under the actual destination weight tariff were $964.65 (117,640 × $0.82).

Of course Continental Grain Company, the consignee, elected to pay freight charges of $571.95 based upon the minimum weight tariff applicable to 120,000 pounds even though only 117,640 pounds of soybeans were unloaded at Beaumont.

Continental Grain Company paid L. H. Grain Co. the point of origin price for 117,640 pounds of soybeans, less certain deductions not material here except for a deduction of a so-called "minimum weight penalty" of $10.97. The "minimum weight penalty" was computed by deducting the destination weight of 117,640 pounds from the minimum weight of 120,000 pounds and multiplying the difference (2,360 pounds) by the freight rate applicable to the minimum weight (the computation is slightly less than it might otherwise be because the consignee did not include the 2.5% surcharge under Ex Parte 281).

L. H. Grain Co. filed a written claim with defendant for $120.99 as the value of the soybeans allegedly lost in transit and for $10.97 for a minimum weight penalty (the $120.99 item was computed by multiplying the shortage in bushels (36.83) by the net sales price of the soybeans per bushel ($3.285). Defendant paid the $120.99 item but declined the $10.97 claim for "minimum weight penalty."

It is unlawful for a common carrier in interstate commerce to, directly or indirectly, by rebate or other device, collect or

receive a less compensation for service rendered in transportation than it charges other persons for like services (49 U. S. C. A. sec. 2). In addition, the Elkins Act enjoins that a carrier strictly observe its tariffs, and makes it unlawful for any shipper or consignee to solicit or receive any rebate or other concession whereby property is transported at a less rate than that published in the carrier's tariffs (49 U. S. C. A. sec. 41).

It will be seen from the foregoing that L. H. Grain Co. has been "made whole" by defendant insofar as the actual disappearance of 2,360 pounds of soybeans is concerned. L. H. Grain Co's. being charged a so-called "minimum weight penalty" of $10.97 by Continental Grain Company is the result of a contractual arrangement whereby L. H. Grain Co. assumes a theoretical charge if Continental is not able to receive the maximum possible benefit, i.e., transportation of the maximum weight possible, from the minimum weight rate tariff provisions.

If defendant would recognize and pay L. H. Grain Co's. claim for the so-called "minimum weight penalty" in the amount of $10.97, defendant would have transported 117,640 pounds of soybeans from Dolliver, Iowa, to Beaumont, Texas, for a freight charge of $560.98, whereas the minimum lawful tariff charge for such transportation was $571.95. The Court is of the opinion that such would constitute a rebate and be unlawful.

The Court finds that defendant's Motion for Summary Judgment should be sustained upon the issue referred to above, and further finds that plaintiffs' said motion should be overruled.

PREPARATION OF ORDER.

Counsel for defendant should prepare an order consistent with the foregoing, submit the same to counsel for plaintiffs for approval as to form, and forward to the undersigned for signature.

Dated: December 19, 1974.

/s/ JOHN N. HUGHES,
Judge, Fifth Judicial District of Iowa.

Mail copies to:

Frank W. Davis, Jr.,
1021 Fleming Building,
Des Moines. Iowa.

William R. King,
2300 Financial Center,
Des Moines. Iowa.

APPENDIX C.

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY.

ALBION ELEVATOR CO., et al., *Plaintiffs,* *vs.* CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY. *Defendant.*	Law No. 2233

TRIAL STIPULATION.

COME NOW plaintiffs and defendant, by their respective counsel of record, and, for the purposes of the pending action only, stipulate and agree as follows:

1. At all times material hereto, plaintiffs were corporations, partnerships and/or associations qualified to transact business in the State of Iowa.

2. At all times material hereto, plaintiffs were engaged in the business of tendering grain for transportation in interstate commerce by common carriers by railroad.

3. At all times material hereto, the Iowa Grain and Feed Association was a duly authorized agent for plaintiffs.

4. At all times prior to June 1, 1972, the Chicago and North Western Railway Company was a common carrier by railroad, was a corporation organized and existing under the laws of the State of Wisconsin with its principal place of business in the State of Illinois and was qualified to transact business in the State of Iowa as a foreign corporation.

5. At all times since June 1, 1972, defendant has been a common carrier by railroad, has been a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Illinois and has been qualified to transact business in the State of Iowa as a foreign corporation. Defendant is the successor in interest to the Chicago and North Western Railway Company.

6. At all times material hereto, defendant and its predecessor in interest have been engaged in the interstate transportation of freight for hire, and the furnishing of services in connection therewith, and have been subject to the provisions of the Interstate Commerce Act, 49 U. S. C. A. §§ 1, *et seq.*

7. At all times material hereto, defendant and its predecessor in interest have had on file with the Interstate Commerce Commission in the District of Columbia the tariffs, rates and classifications required by the provisions of 49 U. S. C. A. § 6.

8. The issues to be decided in the pending action at the present time are those raised by Count III of Division I-LX, inclusive, of the Petition at Law, as amended, by Count III of Divisions I-LX, inclusive, of the Answer and by Division LXV of the Answer.

9. The issues to be decided in the pending action at the present time are governed by the provisions of the Interstate Commerce Act, 49 U. S. C. A. §§ 1, *et seq.*, particularly the provisions of 49 U. S. C. A. § 20(11) and the provisions of 49 U. S. C. A. §§ 2, 3(1) and 41.

10. For the purpose of resolution of the issues to be decided in the pending action *at the present time*, plaintiffs and defendant stipulate and agree as follows with respect to each shipment at issue herein:

a. Each shipment was tendered by one of plaintiffs to defendant for transportation in interstate commerce pursuant to the terms and conditions of the Uniform Straight Bill of Lading.

b. Each shipment was tendered by one of plaintiffs to defendant for transportation in interstate commerce with freight charges collect at destination.

c. The contract for sale of the commodity between the consignor and the consignee for each shipment contained the following provision:

> Unless otherwise noted above, this Contract shall be governed by the rules of the Grain and Feed Dealers National Association and, to the extent not in conflict with the aforesaid rules, by the Uniform Commercial Code.

d. Rule 23 of the Grain and Feed Dealers National Association provides that it shall be the duty of the [consignor] to load cars in accordance with applicable tariff rules [with respect to minimum weights] and to assume any loss resulting from noncompliance with such [tariffs].

e. The origin weight for each shipment was correctly determined.

f. The destination weight for each shipment was correctly determined.

g. The destination weight for each shipment was less than the origin weight.

h. Freight charges for each shipment were paid by the consignee thereof.

i. Freight charges for each shipment were paid by the consignee thereof, at the election of the consignee, on the basis of freight rates applicable to minimum weights rather than freight rates applicable to actual destination weights.

j. Freight charges applicable to minimum weights are the same for both the minimum weight and all weights below the minimum weight.

k. The consignee of each shipment charged the consignor of each shipment a minimum weight penalty computed by subtracting the gross destination weight from the

minimum weight and multiplying the difference by the freight rate applicable to the minimum weight.

l. Plaintiffs, by their agent, filed a timely claim in writing with defendant for each shipment.

m. The claim for each shipment contained both a claim for the value of grain allegedly lost and a claim for a minimum weight penalty.

n. The claim for the value of grain allegedly lost for each shipment was computed by multiplying the net shortage in bushels by the net sales price of the commodity per bushel.

o. The net sales price of the commodity per bushel for each shipment was payable to the consignor by the consignee on the basis of net bushels actually delivered.

p. The net sales price of the commodity per bushel for each shipment did not include freight charges.

q. The claim for the minimum weight penalty for each shipment was computed by subtracting the gross destination weight from either the origin weight or the minimum weight, whichever was less, and multiplying the difference by the freight rate applicable to the minimum weight.

r. Defendant has paid, in whole or in part, the claim for the value of grain allegedly lost for each shipment.

s. Defendant has timely declined in writing the claim for a minimum weight penalty for each shipment.

11. For the purpose of resolution of the issues to be decided in the pending action *at the present time*, plaintiffs and defendant stipulate and agree that the following factual situation is representative of the claims at issue herein:

a. On March 16, 1972, plaintiff, L. H. Grain Company, as consignor, tendered to defendant's predecessor in interest at Dolliver, Iowa, a carload of soybeans in CNW 31426 under a Uniform Straight Bill of Lading.

b. The contract for sale of the soybeans between L. H. Grain Company, as consignor, and Continental Grain Company, as consignee, provided that it was the duty of L. H. Grain Company, as consignor, to deliver 120,000 pounds of soybeans to Continental Grain Company as consignee, and to assume any loss resulting from noncompliance.

c. The origin weight of the shipment was 120,000 pounds.

d. On March 27, 1972, CNW 31426 was unloaded at Beaumont, Texas, by Continental Grain Company, as consignee.

e. The destination weight of the shipment was 117,640 pounds.

f. The minimum weight applicable to the shipment was 120,000 pounds. (Item 460 of CNW Freight Tariff 16406-L).

g. The freight rate applicable to the minimum weight was $0.476625 per one hundred pounds. (Column 3 of Section 3 of CNW Freight Tariff 16406-L, plus ex parte increases and surcharge).

h. The freight charges applicable under the minimum weight tariff was $571.95 (120,000 × $0.476625).

i. The freight charges applicable under the minimum weight tariff were the same based on either a destination weight of 120,000 pounds or a destination weight of 117,640 pounds.

j. The freight rate applicable to the actual destination weight was $0.82 per one hundred pounds. (Column G of Section 2 of CNW Freight Tariff 16306-L, plus ex parte increases and surcharge).

k. The freight charges applicable under the actual destination weight tariff would have been $964.65. (117,640 × $0.82).

l. Continental Grain Company, the consignee, elected to pay freight charges based on the minimum weight tariff applicable to 120,000 pounds.

m. Continental Grain Company, the consignee, charged and collected from L. H. Grain Company, the consignor, a minimum weight penalty of $10.97 computed by deducting the gross destination weight of 117,640 pounds from the minimum weight of 120,000 pounds and multiplying the difference (2,360 pounds) by the freight rate applicable to the minimum weight ($0.4650). (The consignee did not add the 2.5% surcharge under Ex Parte 281).

n. On May 11, 1972, L. H. Grain Company, the consignor, by its agent, Iowa Grain and Feed Association, filed a timely claim in writing with defendant.

o. The claim contained a claim for $120.99 for the value of the soybeans allegedly lost and a claim for $10.97 for a minimum weight penalty.

p. The claim for the value of the grain allegedly lost was computed by multiplying the net shortage in bushels (36.83) by the net sales price of the soybeans per bushel ($3.285).

q. The claim for the minimum weight penalty was computed by deducting the gross destination weight of 117,640 pounds from the origin weight of 120,000 pounds (which was also the minimum weight) and multiplying the difference (2,360 pounds) by the freight rate applicable to the minimum weight ($0.465). (The consignor did not add the 2.5% surcharge under Ex Parte 281).

r. On May 26, 1972, defendant timely declined in writing the claim for a minimum weight penalty.

s. On June 9, 1972, defendant paid Iowa Grain and Feed Association $120.99.

12. For the purpose of resolution of the issues to be decided in the pending action at the present time, plaintiffs contend that the minimum weight penalty is a proper element of damages permitted under the provisions of 49 U. S. C. A. § 20(11). Defendant denies such contention.

13. For the purpose of resolution of the issues to be decided in the pending action at the present time, defendant contends that the minimum weight penalty is a rebate of freight charges prohibited under the provisions of 49 U. S. C. A. §§ 2, 3(1) and 41. Plaintiffs deny such contention.

14. Plaintiffs and defendant specifically reserve from the issues to be decided in the pending action at the present time those raised by Counts I and II of Divisions I-LX, inclusive, of the Petition at Law, as amended, by Counts I and II of Divisions I-LX, inclusive of the Answer and by Divisions LXI, LXII, LXIII, LXIV, LXVI, LXVII, LXVIII and LXIX of the Answer and this Trial Stipulation shall have no application thereto.

15. Plaintiffs and defendant stipulate and agree that the issues to be decided in the pending action at the present time may be decided without further evidence by either party, unless otherwise ordered by the Court.

Dated at Des Moines, Iowa, this 28th day of May, 1974.

THOMA, SCHOENTHAL, DAVIS, HOCKENBERG & WINE,

By /s/ RICHARD G. SANTI,
Richard G. Santi,

/s/ WILLIAM F. CONLON,
William F. Conlon,
400 Empire Building,
Des Moines, Iowa 50309,
Telephone: 515-283-2491,
Attorneys for Plaintiffs.

GAMBLE, RIEPE, BURT, WEBSTER
& FLETCHER,
By /s/ FRANK W. DAVIS, JR.,
Frank W. Davis, Jr.,
1021 Fleming Building,
Des Moines, Iowa 50309,
Telephone: 515-282-0216,
Attorneys for Defendant.

APPENDIX D.

INTERSTATE COMMERCE ACT, 49 U. S. C. A. §§ 2, 3(1) AND 6(7).

§ 2 If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

§ 3(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

§ 6(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passen-

gers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

INTERSTATE COMMERCE ACT, CARMACK AMENDMENT, 49 U. S. C. A. § 20(11).

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving prop-

erty for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordi-

nary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant

that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

ELKINS ACT, 49 U. S. C. A. § 41.

(1) Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42 or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in chapter 1 of this title or by sections 41, 42 or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to chapter 1 of this title to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be

transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of chapter 1 of this title, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any

prosecution begun under sections 41, 42 or 43 of this title, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Supreme Court, U. S.
FILED
SEP 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977.

No. 77-299

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A CORPORATION,

Petitioner,

vs.

BRANDT ELEVATOR, INC., L. H. GRAIN CO., AND JOHNSON GRAIN & MILLING CO.,

Respondents.

BRIEF IN OPPOSITION

WILLIAM J. KOEHN
WILLIAM R. KING
PERRY D. BRADSHAW
2300 Financial Center
Des Moines, Iowa 50309
Telephone: (515) 243-2300

Attorneys for Respondent.

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BRANDT ELEVATOR, INC., L. H. GRAIN CO., AND JOHNSON GRAIN & MILLING CO.,

Respondents.

BRIEF IN OPPOSITION

Respondents assert this Court may lack jurisdiction to grant the Writ petitioner seeks, and even if the Court has such jurisdiction, it should exercise its discretion to deny the writ.

OPINIONS BELOW

Respondents accept petitioner's presentation.

JURISDICTION

The petition asserts final judgment of the Supreme Court of Iowa was rendered on May 25, 1977, and that this Court has jurisdiction to review that judgment by Writ of Certiorari under 28 U.S.C. §1257 (3). In fact, the decision of the Iowa Supreme Court merely reversed the granting by the trial court of the motion for summary judgment of the defendant (petitioner herein), which motion was based upon only one of several affirmative defenses set forth by the then defendant to the claims of the plaintiffs (respondents herein). By virtue of the present status of the case in the State court, and as more particularly set forth in the arguments in opposition, infra, a question exists whether this Court has jurisdiction under the above referenced statute due to the lack of any final judgment or decree, as required thereby.

QUESTION PRESENTED

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §20 (11) renders a common carrier liable for the full actual loss, damage or injury to property it receives for transportation. In the instant case the stipulated facts indicate the shipper, L. H. Grain Company, shipped 120,000 pounds of soybeans from Dolliver, Iowa, to Beaumont, Texas, but the amount of grain

delivered totaled only 117,360 pounds. The freight rate applicable to this minimum weight was .476625/cwt and the railroad, as always, collected the full freight charge of $571.95 (120,000 pounds x .476625/cwt) based upon the minimum weight rather than actual destination weight. As a result, the shipper suffered the loss of the "minimum weight penalty" of $10.97 representing the difference between the product of the weight of the soybeans shipped and the weight of the soybeans delivered (after allowance for weight shrinkage).

The Supreme Court of Iowa held that where a shipper receives only the point of shipment value of a lost commodity rather than its destination value, a measure of damages which permits him to recover freight charges paid on the lost portion of the shipment as compensation for his "full actual loss" is proper. The question addressed to this Court by the petitioner is whether the payment by a common carrier of a "minimum weight penalty" constitutes a rebate of freight charges prohibited by the Elkins Act, 49 U.S.C. §41 and the Interstate Commerce Act, 49 U.S.C. §§2 and 3(1). These respondents substantially agree with that statement of the issue, but it is overly broad to the extent that it fails to consider the opinion of the Supreme Court of Iowa was limited to the situation in which the shipper receives only the point of shipment value of the lost commodity rather than its destination value.

STATUTES INVOLVED

The respondents agree that the statutes set out by the petitioner are involved in this matter. However, since the respondents believe there exists a question whether this Court is without jurisdiction to grant certiorari at this time, a consideration of 28 U.S.C. §1257(3) is also mandated. That statute is set forth in Appendix A at p. A1.

STATEMENT OF THE CASE

The respondents agree with the statement of facts set out in the petition for a Writ of Certiorari. The statement is, however, incomplete with respect to certain facts which raise a question of this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). Supplementation is, therefore, required.

As the petition indicates, 60 grain dealers filed action against the transportation company, and each asserted three theories of recovery. Count I sought recovery upon a theory of negligence, Count II upon a theory of breach of contract and Count III upon a theory of statutory liability under the Carmack Amendment. Prior to answer, the defendant transportation company filed a document entitled, "Combined Motions to Dismiss, Strike and for More Specific Statement." Insofar as the document constituted a motion to dismiss and a motion

to strike it is set out in Appendix B at pp. B1 - B3. The gravamen of each motion was that Counts I and II of each claim must be struck as fatally inconsistent with Count III, which purported to state a claim for relief under the Carmack Amendment, which, it was alleged in the motions, is the exclusive ground for liability of a common carrier for damage to a shipment transported in interstate commerce.

By ruling of January 4, 1973, the district court, by Harry Perkins, Judge, overruled the company's motions to dismiss and to set aside "on each of the grounds urged in support thereof." A copy of that ruling is contained in Appendix C at p. C1.

Later the transportation company filed answer and therein set up nine affirmative defenses to the various claims of the plaintiffs. Those divisions of the answer which consist of affirmative allegations are set out in Appendix D at pp. D1 - D9. It is pertinent to note that one division thereof reasserts the allegation that the liability of a common carrier for damage to a shipment transported in interstate commerce is determined exclusively under the provisions of the Carmack Amendment, two divisions assert the plaintiffs' claims are barred by statutes of limitations contained in 49 U.S.C. §16(3) and one division raises the question petitioner now asks this Court to address. The plaintiffs by way of reply denied the legal

effect alleged by the transportation company in each division.

The transportation company's motion for summary judgment, which was sustained by the trial court, but effectively overruled on appeal by the Supreme Court of Iowa, was based upon only one of the affirmative defenses set up in the answer -- the assertion that the claims for relief were claims for rebates of freight charges on shipments of property transported in interstate commerce and barred by the provisions of 49 U.S.C. §§2, 3(1) and 41. The decision of the Supreme Court of Iowa, therefore, disposed of only one issue and left the remainder of the case, including trial and resolution of the possible remaining issues.

ARGUMENTS IN OPPOSITION TO THE GRANTING OF THE WRIT

I.

This Court May be Without Jurisdiction to Issue the Writ.

The petitioner has asserted that the "judgment" of the Supreme Court of Iowa was rendered on May 25, 1977, and is final, and that this Court has jurisdiction to review the "judgment" by Writ of Certiorari under 28 U.S.C. §1257(3). This assertion must be questioned.

In material part, the statute provides:

"Final judgments on decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"*

"*

"(3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or Commission held or authority exercised under, the United States."

Petitioner asks the Court to review a decision which may not meet the finality requirement of the above statute.

The only effect of the decision of the Iowa Supreme Court in this matter was to disallow as a defense the affirmative allegations of Division LXV of the transportation company's answer. The remainder of the case, including affirmative defenses in eight other divisions, has yet to be resolved and trial has not even commenced.

Admittedly this Court has recognized four classes of situations in which the finality rule is relaxed due to compelling

circumstances, but the respondent questions whether the instant case is one in which such treatment would be appropriate. As noted by this Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-478 (1975):

> "In most, if not all, of the cases in these categories, these additional proceedings (in the lower State courts) would not require the decision of other federal questions that might also require review by the court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' (citation omitted) as well as precipitate interference with state litigation."

In the present case there remains at least one federal question which might be decided in the proceedings pending in the Iowa District Court. It is true that the facts adduced at trial, and their legal effect, could render unnecessary any decision as to the exclusivity of the Carmack Amendment as the respondents' remedy, but the possibility still exists, especially if the petitioner is able to prove, by way of defense, that the claims of the shippers were untimely presented under the Interstate Commerce Act. In such a situation, the court might be forced to address whether the federal legislation precludes common law recovery.

If the Court would deem review of the question at hand appropriate when this case has become final and all pending federal questions can be addressed, that review will be available. The fact the highest state court in a second appeal refuses to reconsider the federal question decided in the first appeal does not deprive this Court of jurisdiction to review the second judgment. Urie v. Thompson, 337 U.S. 162, 172-173 (1949). Even if the State court on the second appeal designates its earlier ruling as the law of the case, this Court may reexamine the earlier ruling. Reece v. Georgia, 350 U.S. 85, 87 (1955).

II.

The Court Should Await the Benefit of Decisions of Other Appellate Courts Before Addressing the Issue.

Petitioner contends the question of which it seeks review is of far-reaching importance and great and recurring significance. Respondent respectfully asserts that this Court should await the benefit of decisions of other appellate courts before addressing the issue.

Research reveals hardly any applicable case authority. Apparently the issue the petitioner poses has spawned very little litigation. This Court should defer any consideration of the matter until it has the benefit of the treatment and analysis of other courts

regarding the question. This would have the further advantage of bringing the scope of the issue into better focus.

Petitioner has not asserted any significant conflict between the Circuit Courts of Appeal or other high appellate courts. Indeed, no significant conflict exists. This Court should await further development before treating an issue the scope of which is simply not clear at this time.

III.

The Supreme Court of Iowa Carefully considered the Issue and Arrived at the Correct Decision.

Petitioner asserts that the Supreme Court of Iowa decided an important question of federal law which has not been settled by this Court, and that it erroneously interpreted the Carmack Amendment and the Elkins Act of the Interstate Commerce Act. With these contentions the respondents disagree.

Petitioner attempts to distinguish Pennsylvania R. Co. v. Olivit Bros., 243 U.S. 574 (1917), upon which the Supreme Court of Iowa admittedly placed some reliance, from the situation to which the Iowa high court addressed itself. In fact, petitioner, presents distinctions without legal difference. At pages seven and eight of its petition, the transportation company asserts that since it paid respondents the same price per bushel for

the lost shipments as the consignee contracted to pay for the delivered grain, the respondents were made whole. The stipulated facts clearly indicate they were not made whole, but rather were denied compensation for their loss representing the minimum weight penalty.

Secondly, the petitioner makes some point of the fact the consignee elected to pay the lower freight rate, and appears to argue this somehow prevents the consignor from making a subsequent claim for the minimum weight penalty. This simply does not affect the legal issues addressed in Olivit, and provides no support for the petitioner, because the effective rate is still higher on a partially lost shipment than a full shipment, and a loss is thereby sustained.

Furthermore, petitioner argues the minimum weight penalty was a creation of the respondents and the consignee, that it was merely the creation of an "actual loss" through private contracts and that the petitioner was not a party to the contract in question or a subscriber to Rule 23 of the Grain and Feed Dealers National Association. The foregoing contentions fail to withstand logical scrutiny. The private contract, and Rule 23, did not "create" an actual loss. The actual loss arose independent of the contract. Rather, the contract merely placed the burden of the loss on, and gave the right to make a claim for the same to, the respondent,

the consignor. In no sense did this contractual adjustment of relative rights create a loss which did not exist independent of the contract.

With the asserted distinctions between Olivit and the case at bar being more imagined than real, the former stands as square authority for the decision of the Supreme Court of Iowa. The issue addressed in Olivit was framed by the Court at page 585 of 243 U.S. as follows:

> "The fourth contention is that plaintiff should not recover as part of its damages the freight paid upon delivery at destination.
> "The contention is rested upon the prohibition of the Interstate Commerce Act against deviation from the filed tariffs and schedules and against rebates and undue preferences and discriminations. ***."

At page 586 the Court continued:

> "(I)t was agreed at the trial that the proper measure of damages was to be computed upon the basis of the value of the property at the place and time of shipment***. As plaintiff further says, to recover the damages sustained by it, based upon this value, plaintiff must receive from defendant the difference between this value and

> the proceeds of sale, and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight."

Olivit stands as convincing authority for the decision of the Iowa Supreme Court. On page eight of its petition, the transportation company suggests that Olivit was somehow eroded by this Court's decision three years later in Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 253 U.S. 97 (1920). Respondents do not understand in what manner this might be, nor is it clear from the petition. The Supreme Court of Iowa was not unaware of the existence of McCaull-Dinsmore. In fact, the Iowa court quoted the case in its opinion for the proposition that the common law measure of damages was incorporated into the provisions of the Interstate Commerce Act. See petition, Appendix A, p. A-19.

The respondents have little quarrel with most of general propositions advanced by the cases cited in Division III, Reasons for Granting the Writ, in the petition. Thus, it is not contended here that the petitioner can properly give a "rebate" to the respondents. Nor is it contended that the respondent can lawfully discriminate between shippers or deviate from published tariffs. The authority advanced, however, is inapposite to the situation in this action, and petitioner begs the true question of whether a minimum weight penalty is

a proper element of damage under the Carmack Amendment.

First, a shipper who is truly damaged by a railroad's breach of its shipping contract receives no rebate or preference when the railroad pays the amount of loss. Only an overpayment would constitute a rebate or preference. See Southern Pacific Co. v. Miller Abattoir Co., 454 F. 2d 357 (3d Cir. 1972).

Petitioner appears to argue that since the tariff provides a rate based on minimum weight, the railroad cannot charge less than or deviate from the minimum weight even if part of the shipment is lost. The simple answer to this contention is that the railroad did collect, and has been collecting, the minimum weight charge. There is no deviation from the published tariff, and any subsequent payment of a claim cannot change that fact.

Finally, the respondents object to the petitioner's assertion on page 11 of the petition that the agreement between the respondent and its consignor in the stipulated fact situation "was created for the benefit of shipper and consignee in order to gain a lower shipping rate than the published tariff rate." There is no support whatsoever in the record before this Court or the Iowa courts that the contract was for the purpose of circumventing the tariff rate, or intended by the parties to accomplish that result. The respondents respectfully assert it

would not be proper for the Court to consider that assertion, and reassert that the contract between the Consignor and Consignee merely apportioned the loss, and did not create a loss.

The respondents believe further affirmative discussion of the merits is unnecessary. The Supreme Court of Iowa carefully considered the issue presented and arrived at the proper result, one which is in harmony with both the Carmack Amendment and the Elkins Act.

CONCLUSION

This Court is faced with a threshold question of whether it has jurisdiction to grant the requested Writ of Certiorari under 28 U.S.C. §1257(3). Assuming arguendo that the Court does have jurisdiction, the Court would, nonetheless, benefit by further treatment and analysis of other appellate Courts. Further, the Supreme Court of Iowa carefully considered the issue and arrived at the proper result.

Respectfully submitted,

WILLIAM J. KOEHN
WILLIAM R. KING
PERRY D. BRADSHAW
2300 Financial Center
Des Moines, Iowa 50309
Telephone: (515) 243-2300

Attorneys for Respondent

APPENDIX A

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

IN THE DISTRICT COURT OF THE STATE
OF IOWA IN AND FOR POLK COUNTY

APPENDIX B

MOTIONS FILED IN DISTRICT COURT
BY THE PETITIONER

MOTION TO DISMISS

COMES NOW the defendant, Chicago and North Western Transportation Company, successor in interest to Chicago and North Western Railway Company, and, pursuant to the provisions of Iowa R. Civ. P. 111 and 104(b), moves the court to dismiss Counts I. and II. of each Division of the Petition at Law herein, as amended, for failure to state claims on which any relief can be granted and, as grounds therefore respectfully states:

1. Count I. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon alleged breach of contract.

2. Count II. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon alleged negligence.

3. Count III. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon the provisions of the Carmack Amendment, 49 U.S.C.A. §20 (11).

4. The Carmack Amendment, 49 U.S.C.A. § 20 (11), provides, in part, as follows:

> Any * * * railroad * * * receiving property for transportation from a point in one State * * * to a point in another State * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it * * *.

5. The provisions of the Carmack Amendment, 49 U.S.C.A. § 20 (11), by its terms, are applicable only to shipments transported by a common carrier in interstate commerce.

6. Under the allegations of Count III. of each Division of the Petition at Law herein, as amended, the shipments at issue herein must be considered to have been transported by a common carrier in interstate commerce.

7. The liability of a common carrier for damage to a shipment transported in interstate commerce is determined exclusively under the provisions of the Carmack Amendment, 49 U.S.C.A. §20 (11).

8. By reason of the foregoing, Counts I. and II. of each Division of the Petition at Law herein, as amended, do not state claims on which any relief can be granted for the reason that the same are attempts to plead theories of liability which are fatally inconsistent with the liability imposed by the Carmack Amendment.

MOTION TO STRIKE

Division I.

COMES NOW the defendant, Chicago and North Western Transportation Company, successor in interest to Chicago and North Western Railway Company, and, pursuant to the provisions of Iowa R. Civ. P. 111 and 113, moves the court to strike Count I. of each Division of the Petition at Law herein, as amended, for the reason that the same is improper and unnecessary matter and, as grounds therefore, respectfully states:

1. Defendant incorporates herein by reference the statements contained in paragraphs 1, 3, 4, 5, 6 and 7 of the foregoing Motion to Dismiss.

2. By reason of the foregoing, Count I. of each Division of the Petition at Law herein, as amended, is improper and unnecessary matter for the reason that the same is an attempt to plead a theory of liability which is fatally inconsistent with the liability imposed by the Carmack Amendment.

Division II.

COMES NOW the defendant, Chicago and North Western Transportation Company, successor in interest to Chicago and North Western Railway Company, and, pursuant to the provisions of Iowa R. Civ. P. 111 and 113, moves the court to strike

Count II. of each Division of the Petition at Law herein, as amended, for the reason that the same is improper and unnecessary matter and, as grounds therefore, respectfully states:

1. Defendant incorporates herein by reference the statements contained in paragraphs 2, 3, 4, 5, 6 and 7 of the foregoing Motion to Dismiss.

2. By reason of the foregoing, Count II. of each Division of the Petition at Law herein, as amended, is improper and unnecessary matter for the reason that the same is an attempt to plead a theory of liability which is fatally inconsistent with the liability imposed by the Carmack Amendment.

the Carmack Amendment.

APPENDIX C

RULING OF TRIAL COURT ON MOTIONS TO DISMISS AND STRIKE

Defendants combined motions are ruled upon as follows:

Motion to Dismiss - Defendants motion to dismiss is overruled on each of the grounds urged in support thereof.

Motion to Strike - Defendants motion to strike is overruled on each of the grounds urged in support thereof.

Motion for more Specific Statement - Defendants motion for more specific statement is sustained. The court in so ruling recollects that at the hearing on this motion counsel for the parties agreed that certain of the requested information could be or had been furnished informally. The court will consider any particular item that cannot be agreed upon by the parties.

Harry Perkins
Judge

APPENDIX D

AFFIRMATIVE DEFENSES IN DISTRICT COURT RAISED BY THE PETITIONER

DIVISION LXI.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. Count I. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon alleged breach of contract.

2. Count II. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon alleged negligence.

3. Count III. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon the provisions of the Carmack Amendment, 49 U.S.C.A. § 20 (11).

4. The Carmack Amendment, 49 U.S.C.A. § 20 (11), provides, in part, as follows:

> Any * * * railroad * * * receiving property for transportation from a point in one State * * * to a point in another State * * * shall issue

a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it * * *.

5. The provisions of the Carmack Amendment, 49 U.S.C.A. § 20 (11), by its terms, are applicable only to shipments transported by a common carrier in interstate commerce.

6. Under the allegations of Count III. of each Division of the Petition at Law herein, as amended, the shipments at issue herein must be considered to have been transported by a common carrier in interstate commerce.

7. The liability of a common carrier for damage to a shipment transported in interstate commerce is determined exclusively under the provisions of the Carmack Amendment, 49 U.S.C.A. § 20 (11).

8. By reason of the foregoing, Counts I. and II. of each Division of the Petition at Law herein, as amended, do not state claims on which any relief can be granted for the reason that the same are attempts to plead theories of liability which are fatally inconsistent with the liability imposed by the Carmack Amendment.

WHEREFORE, defendant prays that Counts I. and II. of Divisions I. - LX., inclusive, of the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXII.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. The claims for relief alleged in the Petition at Law filed herein, as amended, are claims for loss of and/or damage to shipments of property transported in interstate commerce.

2. The claims for relief alleged in the Petition at Law filed herein, as amended, were not filed with the Interstate Commerce Commission within two years from the time the same accrued.

3. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred by the statute of limitations contained in 49 U.S.C.A. § 16 (3)(b).

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXIII.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively

alleges:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXII hereof.

2. Said shipments of property were transported in interstate commerce under written agreements known as Uniform Straight Bills of Lading or Uniform Order Bills of Lading which contained the following provision:

> As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property * * * and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

3. The claims for relief alleged in the Petition at Law filed herein, as amended, were not filed and/or suit was

not instituted thereon within the times specified in the Uniform Straight Bills of Lading or Uniform Order Bills of Lading.

4. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred for failure to comply with the contractual condition precedent contained in the Uniform Straight Bills of Lading or Uniform Order Bills of Lading.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXIV.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. The claims for relief alleged in the Petition at Law filed herein, as amended, are claims for the overcharge of freight charges on shipments of property transported in interstate commerce.

2. The claims for relief alleged in the Petition at Law filed herein, as amended, were not commenced as actions at law nor was complaint filed thereon with the Interstate Commerce Commission within three years from the time the same accrued.

3. By reason of the foregoing, the

claims for relief alleged in the Petition at Law filed herein, as amended, are barred by the statute of limitations contained in 48 U.S.C.A. § 16 (3)(c).

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXV.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein, by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. The claims for relief alleged in the Petition at Law filed herein, as amended, are claims for rebates of freight charges on shipments of property transported in interstate commerce.

2. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred by the provisions of 49 U.S.C.A. §§ 2, 3(1) and 41.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXVI.

COMES NOW the defendant, Chicago and North Western Transportation Company,

and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXII. hereof.

2. The claims for relief alleged in the Petition at Law filed herein, as amended, were not liquidated or certain.

3. Subsequent to the accrual of the claims for relief alleged in the Petition at Law filed herein, as amended, and prior to the date of filing of the Petition at Law herein, plaintiffs and defendant orally agreed to compromise, adjust and settle said claims for relief, defendant has paid to plaintiffs the sums so agreed upon and plaintiffs have accepted the said sums.

4. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred and discharged by accord and satisfaction.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXVII.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion

Elevator Co., et al., affirmatively alleges:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXII. hereof.
2. Defendant incoporates herein by reference the allegations contained in paragraphs 2 and 3 of Division LXVI. hereof.
3. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred and discharged by compromise and settlement.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXVIII.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXIV. hereof.
2. Defendant incorporates herein by reference the allegations contained in paragraphs 2 and 3 of Division LXVI. hereof.
3. By reason of the foregoing, the

claims for relief alleged in the Petition at Law filed herein, as amended, are barred and discharged by accord and satisfaction.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXIX

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al, affirmatively alleged:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXIV. hereof.
2. Defendant incorporates herein by reference the allegations contained in paragraphs 2 and 3 of Division LXVI. hereof.
3. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred and discharged by compromise and settlement.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DAVIS, JOHNSON, BURT & DAVIS

By

/s/ Frank W. Davis, Jr.

FRANK W. DAVIS, JR.
1021 Fleming Building
Des Moines, Iowa 50309
Telephone: 515-282-0216

Attorneys for Defendant.